

This is a claim for an April 11, 2003 accident and alleged injuries to claimant's neck, right shoulder, and right arm. In the August 9, 2004 Award, Judge Foerschler denied claimant's request for workers compensation benefits after finding claimant failed to prove he injured himself at work. The Judge also ordered claimant to pay court reporter fees and transcript costs totaling \$836.90, which were incurred for the regular hearing and Dr. P. Brent Koprivica's deposition.

Claimant contends Judge Foerschler erred. Claimant argues the Board should reverse the August 9, 2004 Award and grant him medical benefits; temporary total disability benefits for the period from April 12, 2003, through June 12, 2003; and permanent partial general disability benefits for a 12.5 percent whole person functional impairment.

Conversely, respondent and its insurance carrier contend the August 9, 2004 Award should be affirmed. They argue claimant failed to prove he sustained an accident at work. In the alternative, respondent and its insurance carrier argue claimant sustained a subsequent injury to his neck the evening of April 11, 2003, watching car races.

The issues before the Board on this appeal are:

1. Did claimant injure himself at work on April 11, 2003, while delivering packages for respondent?
2. Is claimant entitled to receive temporary total disability benefits from April 12, 2003, through June 12, 2003?
3. What is the nature and extent of claimant's injury and disability?
4. Is claimant entitled to receive medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

For the reasons below, the August 9, 2004 Award should be reversed as claimant should receive workers compensation benefits for a neck injury that arose out of and in the course of his employment with respondent.

Respondent's business is to deliver parcels. Claimant is a longtime employee whose job is to pick up and deliver packages.

The greater weight of the evidence establishes that claimant injured his neck on April 11, 2003, while delivering packages for respondent. On that date, while lifting and handling a heavy package for one of respondent's business customers, claimant experienced pain that radiated from his neck into his right arm. The Board concludes claimant's neck injury was caused by an accident that arose out of and in the course of his employment with respondent.

Claimant experienced the pain in his neck and right shoulder before noon on Friday, April 11, 2003, while handling a heavy package being delivered to a railroad. The pain, however, did not prevent claimant from completing his shift. Claimant did not report the incident to respondent on April 11, 2003, as it was not unusual for him to experience work-related aches and pains that would resolve. Such was the nature of claimant's work. Additionally, reporting an injury would adversely affect the company's safety incentives program.

That evening claimant went to a local speedway, where he watched the car races from a terrace overlooking the track. Claimant's neck and right arm were hurting and stiff, which prompted him to take some ibuprofen and apply ice to his neck. When claimant awoke the next morning, which was Saturday, his neck pain was severe and he sought medical treatment at an emergency room. While at the emergency room, he telephoned respondent and reported his neck injury.

On Monday morning, April 14, 2003, claimant met with one of respondent's business managers, Hamilton Terrell, and one of respondent's health and safety managers, Randy Clayton. At that time, claimant completed an accident report and was referred to the company doctor. When discussing the injury, according to Mr. Clayton, claimant reported he had picked up approximately 10 to 15 packages that weighed 50 to 60 pounds for delivery to one customer. Primarily because claimant went to the car races the evening of the alleged accident, Mr. Clayton concluded claimant's injury did not occur at work. Mr. Clayton testified, in part:

I told him [claimant] that it was going to be investigated. That Liberty investigates. I told him my opinion that I didn't think that he did it on the job based on the activity of watching the race and turning his head back and forth, back and forth, back and forth. That's an activity I think would put his neck in danger.¹

The company doctor determined claimant's neck injury did not occur at work. After being advised respondent was disputing the injury occurred at work, claimant sought medical treatment from his personal physician, Dr. Ghassemi, and a chiropractor, Dr. Baker.

On April 17, 2003, the Division of Workers Compensation received claimant's Application for Hearing, which stated claimant's accident occurred from "repetitive lifting packages during the day with one specific instance of lowering a package that made symptoms worse."

¹ Clayton Depo. at 26.

Claimant received conservative medical treatment for his neck and remained off work through June 12, 2003, when Dr. Ghassemi permitted claimant to resume his work activities. At the time of regular hearing, claimant was continuing to work for respondent. Accordingly, claimant does not seek a work disability² in this proceeding.

Claimant's attorney hired Dr. P. Brent Koprivica to evaluate claimant for purposes of this claim. The doctor has experience in both practicing and teaching emergency medicine, has practiced occupational medicine and founded an occupational medicine clinic, and is board-certified in emergency medicine and as an independent medical examiner.

Dr. Koprivica examined claimant in September 2003 and diagnosed a cervical injury with radiculopathy. Due to the cervical radiculopathy, Dr. Koprivica determined claimant had a 15 percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.).

According to the history of injury claimant provided Dr. Koprivica, claimant developed progressive pain in his neck that radiated into his right shoulder and arm from lifting at work. The doctor's September 6, 2003 report reads, in part:

History of Present Injury/Illness

Mr. Rowland denies having prior problems with chronic neck pain, right shoulder pain or right arm pain.

Associated with his work activities on April 11, 2003, specifically the lifting he was doing, Mr. Rowland developed progressive problems with pain in his neck that radiated down to his right shoulder and into his arm.

Mr. Rowland is a stoic individual and completed his shift that evening.

It is not unusual in his work that he would develop pain. However, typically, that would resolve.

Unfortunately, the following morning on awakening, he had significant cervical radicular-like complaints. Based on this, he went to Shawnee Mission Medical Center emergency room.

² A permanent partial general disability under K.S.A. 44-510e that is greater than the functional impairment rating.

In the emergency room, Mr. Rowland was diagnosed as having a cervical radiculopathy. An MRI scan was ordered and he was referred to see Dr. Ahn.³

On the other hand, respondent's insurance carrier hired Frederick A. Buck, D.O., to evaluate claimant. The doctor is board-certified in general surgery and plastic and reconstructive surgery and worked for Ford Motor Company as a plant doctor for eight years. Dr. Buck's curriculum vitae also indicates the doctor is a Fellow of the American Academy of Disability Evaluating Physicians.

Dr. Buck examined claimant in January 2004 and diagnosed cubital tunnel syndrome in claimant's right upper extremity and decreased range of motion in his neck. Dr. Buck concluded claimant did not have cervical radiculopathy. Using the *AMA Guides* (4th ed.), the doctor determined claimant had a 12 percent functional impairment to the right upper extremity. The doctor also concluded claimant had a three percent whole person functional impairment due to loss of motion in the neck. Altogether, Dr. Buck found claimant had a 10 percent whole person functional impairment. But Dr. Buck could not relate claimant's functional impairment to an injury at work.

Moreover, Dr. Buck testified that watching car races would not cause the type of injuries that claimant had sustained. And he also testified that the type of work respondent's package car delivery employees perform will make them sore.

According to Dr. Buck's January 14, 2004 medical report, claimant provided the following history of his neck complaints:

Mr. Roland *[sic]* states that 4/10/03 while performing his regular duty which has been performed for approximately 19 years, he experienced some stiffness in his neck. He felt that this was just a slight injury which would resolve over a period of time and continued to work. Mr. Rowland's regular job and job being performed at the time of alleged injury was that of package care *[sic]* driver. He states the next day while performing the same job he experienced some stiffness again in his neck.

On 4/11/03 patient continued working and just before 11 AM he experienced an increased pain he states primarily in his neck, but did complete shift. Patient states that on 4/12/03, upon awakening he experienced significant pain, again involving his neck and went to Shawnee Mission Medical Center Emergency Department for evaluation and treatment. X-rays were taken of the cervical spine and were reported by Dr. John Yungmeyer as a normal C-spine series. The patient was diagnosed as having right cervical radiculopathy, but emergency room physician

³ Koprivica Depo., Ex. 2 at 3.

record tenderness with muscle spasm which was marked as well as severe sharp burning sensation in the right muscular area of neck. . . .⁴

Respondent and its insurance carrier have vigorously contested this claim on the basis that claimant is not credible. Among other things, respondent and its insurance carrier point out claimant did not immediately report his injury to respondent as he delayed until the following day to notify the company. They also note claimant initially declined to identify the specific package he was lifting on April 11, 2003, when he allegedly experienced the pain in his neck and arm. They argue claimant failed to tell the various doctors that he had seen for his injury that he had watched car races the evening of the alleged accident. And they contend claimant has provided inconsistent descriptions of his alleged injury. The Board, however, finds claimant a credible witness.

Claimant's failure to report his symptoms to respondent on April 11, 2003, does not raise suspicion. As a package car driver, claimant often experienced aches and pains caused by his work. And those aches and pains would resolve. But in this instance, they did not. Instead, claimant's symptoms worsened, which prompted him to seek medical treatment the next morning. Claimant's testimony that he believed his symptoms would resolve and that he was reluctant to report an injury is credible.

In addition, the nature of claimant's work and the resulting injury would account for any perceived inconsistencies in how claimant may have described the accident. From the first detailed description of claimant's injury, which was made to Randy Clayton, through his last medical evaluation in January 2004, claimant has consistently attributed his neck complaints to the lifting he performed for respondent. As indicated in the Application for Hearing filed in April 2003 and as explained at his March 2004 deposition, claimant believed he injured his neck on April 11, 2003, due to a combination of repetitive lifting and lifting a particular package. Claimant testified, in part:

Q. (Ms. Warmund) All right. So was it the repetitive lifting during that day, or was it this specific accident that caused you to feel pain down your -- in your neck and down your right arm?

A. (Claimant) It was -- well, probably kind of a little bit of both, but I'd say it was -- I would say it was the incident, because that's what -- that's when I started -- you know, I felt it.⁵

⁴ Buck Depo., Ex. 2 at 1-2.

⁵ Rowland Depo. at 27.

In addition, claimant noted he had a stiff neck that he attributed to his work the day before the April 11, 2003 incident.

Respondent and its insurance carrier's argument that claimant is not credible due to his failure to tell the doctors that he had attended car races the evening of the alleged accident is, likewise, not persuasive. There is no evidence that claimant sustained any additional injury at the car races or that from his vantage point he was even required to turn his head from side to side to observe the races. And even respondent and its insurance carrier's expert medical witness, Dr. Buck, testified that watching car races would not cause the type of injuries that claimant sustained.

Finally, claimant's reluctance to pinpoint a specific customer or package that he was handling when he experienced the sharp pain in his neck and right upper extremity is understandable.

When considering the entire record, the Board finds claimant injured his neck working for respondent. The Board is not persuaded Dr. Koprivica's 15 percent whole person functional impairment rating is any more accurate than Dr. Buck's three percent whole person functional impairment rating for the neck. Accordingly, the Board averages the two ratings and finds claimant's neck injury comprises a nine percent whole person functional impairment. And as provided by K.S.A. 44-510e, claimant is entitled to receive disability benefits for a nine percent permanent partial general disability.

Claimant is also entitled to receive temporary total disability benefits from April 12, 2003, through June 12, 2003, as he was taken off work during that period to recover from his neck injury. Respondent and its insurance carrier are also responsible for the medical expenses claimant incurred for the injuries associated with this claim. Respondent and its insurance carrier are also responsible for reimbursing Central States Southeast and Southwest Areas Health and Welfare and Pension Funds for any medical expense that it paid in connection with this claim. Furthermore, claimant is entitled to receive unauthorized medical benefits up to the statutory maximum, along with future medical benefits upon proper application to the Director of the Division of Workers Compensation.

Finally, the Board concludes respondent and its insurance carrier should be responsible for all of the administrative and transcript costs in this claim.

AWARD

WHEREFORE, the Board reverses the August 9, 2004 Award entered by Judge Foerschler and finds claimant is entitled to receive workers compensation benefits as follows:

Donald L. Rowland is granted compensation from United Parcel Service and its insurance carrier for an April 11, 2003 accident and resulting disability. Mr. Rowland is entitled to receive 8.86 weeks of temporary total disability benefits at \$432 per week, or \$3,827.52, plus 37.35 weeks of permanent partial general disability benefits at \$432 per week, or \$16,135.20, for a nine percent permanent partial general disability, making a total award of \$19,962.72, which is all due and owing less any amounts previously paid.

Respondent and its insurance carrier shall reimburse Central States Southeast and Southwest Areas Health and Welfare and Pension Funds for any medical expense it paid for the injuries associated with this claim.

Claimant is entitled to payment of the medical expenses incurred for the injuries associated with this claim.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

All administrative costs, reporter fees and transcript costs in this claim shall be paid by respondent and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director